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IN THE

Supreme Court of the United States

October Term, 1942.

No. 909

CATHERINE NESA CONTERNO,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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NAT ROGAN, Collector of Internal Revenue,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

The petition of Catherine Nesa Conterno respectfully shows:

I.

Summary Statement of the Matter Involved

The Commissioner of Internal Revenue levied a tax against your ptitioner in April of 1940 [R. 42] on wine that had been destroyed by fire while stored in a winery

owned and operated by petitioner. The wine in question was owned by petitioner and had not been sold or contracted for sale or encumbered in any manner. [R. 17, 18.] The tax was claimed to be due by reason of the provisions of Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, and now Section 3030 (a)(1)(A), Internal Revenue Code). After an application for an abatement of the assessment had been denied [R. 19], your petitioner paid under protest the sum of $1,937.51 on September 3, 1940 [R. 19], said sum being the amount of the tax assessed, plus interest and penalties. On November 5, 1940, your petitioner filed a claim for refund which was rejected on December 4, 1940. [R. 19.] On March 27, 1941, your petitioner instituted an action for the recovery of the tax against the local Collector of Internal Revenue, respondent in this proceeding. The amended complaint, the pleading upon which the parties went to trial, stated two separate causes of action. [R. 7.] The first cause of action was based on the theory that the tax never legally attached. The second cause of action was based on the theory that the Commissioner should have abated the tax inasmuch as your petitioner was not indemnified for the loss of the tax assessed. Only the first cause of action was tried. [R. 22.] The court, sitting without a jury, gave judgment for plaintiff and your petitioner [R. 23], judgment being entered December 31, 1941. [R. 50.] On March 26, 1942, defendant, respondent herein, appealed to the Circuit Court of Appeals for the Ninth Circuit [R. 51], which court reversed the judgment of the District Court and remanded the cause to the District Court for trial upon the second cause of action. [R. 72.]

II.

Statute Involved.

Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, Section 3030(a)(1)(A) of the Internal Revenue Code, as it appeared prior to the Act of June 24, 1940, Chap. 418, Sections 1 and 2, 54 Stats 516), provide as follows:

> "Upon all still wines, including vermouth, and all artificial or imitation wines or compounds sold as still wine, produced in or imported into the United States after February 24, 1919, or which on February 25, 1919, were on any winery premises or other bonded premises, or in transit thereto or at any customhouse, there shall be levied, collected and paid taxes at rates as follows, when sold, or removed for consumption or sale:
>
> (Here follow rates.)
>
> "The taxes imposed by this subparagraph (A) of this paragraph, shall not apply to de-alcoholized wines * * * nor, subject to regulations prescribed by the Commissioner, with the approval of the Secretary, to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year."

III.

Proceedings in the Circuit Court.

Appellant contended that the statute above quoted laid a tax upon the manufacture of wine and that payment only was delayed until sale or removal for sale and that thereafter the tax assessed by the Commissioner legally attached.

Appellee, your petitioner, contended that the statute above quoted laid a tax upon the sale of wine or its removal for sale or consumption and that, since the wine was destroyed before being sold or removed for sale or consumption, the tax did not legally attach.

The Circuit Court of Appeals reversed the District Court and found that appellant's contention was correct. The opinion of the Circuit Court of Appeals was reported in 132 Fed. (2d) Adv. 726, and is found at page 64 of the transcript of record.

IV.

Jurisdiction.

The judgment of the Circuit Court of Appeals reversing the trial court was entered December 31, 1942. [R. 72.] A petition for rehearing was seasonably filed January 29, 1943. [R. 73.] The petition for rehearing was duly entertained and denied February 16, 1943. [R. 73.] The jurisdiction of this court is invoked under Section 240 of the Judicial Code (U. S. Code, Title 28, Section 347).

V.

Question Presented.

Does the tax on wine imposed by Section 611 of the Act of February 24, 1919 (now Section 3030(a)(1)(A), Internal Revenue Code), attach when such wine is produced or when such wine is sold or removed for consumption or sale?

VI.

Reasons Relied on for the Allowance of the Writ.

(1) The Court Below Has Decided an Important Question of Federal Law Which Has Not Been but Should Be Decided by This Court.

Your petitioner has contended that the tax on wine imposed by Section 3030(a)(1)(A) by the clear wording of the statute attaches not at time of production of the wines, but upon sale or removal for sale or consumption. Respondent has contended that the tax imposed by said statute attaches upon production of wine. The decision of the court below adopts respondent's theory. Neither this court nor any other circuit court of appeals has ruled upon the question.

The question is of the utmost importance to those persons in the wine making industry, inasmuch as the decision made by the Circuit Court in the instant case places the burden of tax upon the producer for all wine produced by him even though the wine is destroyed or otherwise removed from his possession before the benefits are acquired, contrary (so we contend) to the intention of Congress as evidenced by the plain wording of the statute. Petitioner submits that the question involved in the case at bar is of sufficient importance to justify this court in issuing the writ hereafter prayed for. (*International Ry. Co. v. Davidson*, 257 U. S. 506, 516, 66 L. Ed. 341, 347.)

The action of the court below was largely determined by the decision of this court in *Liggett & Myers Co. v.*

U. S., 299 U. S. 383; 81 L. Ed. 294, as shown by the following statements in the opinion of the court below:

> "But notwithstanding appellee's earnest and in some of its phases convincing argument, we are at once confronted with the opinion and decision in Liggett & Myers Co. v. U. S., 299 U. S. 383." [R. 67.]

> "The statutes for tobacco and still wines are basically the same, using in a large part the same phraseology, and we are unable to arrive at any other conclusion than that the statutes would receive identical interpretation by the Supreme Court." [R. 68.]

It is earnestly submitted by your petitioner that the statute involved in the case at bar is distinguishable from the statute construed by this court in the *Liggett & Myers* case. Moreover, a factual distinction exists between tobacco manufacture and wine production whereby the two processes are not at all analogous. In view of the fact that the court below was mistakenly guided (so we contend) by a decision of this court which has no application to the case at bar, it is respectfully submitted that this court should review the case. See *Webster Elec. Co. v. Splitdorf Electrical Co.*, 264 U. S. 463, 469; 68 L. Ed. 792, 795.

Moreover, while it is true that the issue involved in this case has never been decided by another Circuit Court, the only reported decision that directly rules upon the matter is *Fresno Grape Prod. Corp. v. U. S.* (Court of Claims), 11 Fed. Supp. 55. This case specifically upholds the contention of your petitioner. It should be noted that the court that decided the cited case was composed of four judges, all of whom concurred in the decision. Certiorari

has been granted by this court when conflicts exist between decisions of courts other than circuit courts. See *Aetna Ins. Co. v. United Fruit Co.*, 304 U. S. 430; 82 L. Ed. 1443. The distinctions relied upon by petitioner and a complete analysis of the cases cited herein will be more fully discussed in the brief in support of this petition.

(2) The Court Below Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Court.

Petitioner contended in the Circuit Court of Appeals that the statute involved in the case at bar was clear and unambiguous and that no occasion existed to resort to administrative interpretation as an aid to construction of the statute. This court has so held in many cases.[1] Contemporaneous construction, no matter how long continued, must yield to the positive language of the statute.[2]

The Circuit Court of Appeals apparently overlooked this principle of law as enunciated by this court, since, without holding that the statute was ambiguous, it declared in its opinion that administrative regulation "indicate an interpretation consistent with the theory that the tax was a producer's tax." [R. 69.] Your petitioner respectfully submits that the statute is clear and concise in meaning and that resort to administrative interpreta-

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[1]*U. S. v. Grant*, 110 U. S. 219, 221; 28 L. Ed. 126, 127; *Fairbank v. U. S.*, 181 U. S. 283, 311; 45 L. Ed. 862, 874.

[2]*Houghton v. Payne*, 194 U. S. 88; 48 L. Ed. 888; *Helvering v. Credit Alliance Corp.*, 316 U. S. 107; 86 L. Ed. 1307.

tion in aid of construction is contrary to the decisions of this court.

Respondent contended in the Circuit Court of Appeals that by re-enactment of the statute after administrative regulation, Congress impliedly adopted such administrative regulation as the correct construction of the law. Petitioner contended that by decisions of this court this principle is subject to several exceptions. The principle does not apply where the law is clear in its meaning. *Biddle v. Commissioner of Internal Revenue,* 302 U. S. 573, 582; 82 L. Ed. 431, 439. Nor does the principle apply if the construction is plainly erroneous. (*U. S. v. Missouri Pacific R. R. Co.,* 278 U. S. 269; 73 L. Ed. 322.) Nor does the principle apply if the administrative regulation does not purport to clarify the particular matter in dispute. (*Helvering v. New York Trust Co.,* 292 U. S. 455, 468; 78 L. Ed. 1361, 1368; *Texas & P. R. Co. v. U. S.,* 289 U. S. 627, 643; 77 L. Ed. 1410, 1425.) Apparently, since the opinion made no reference to it, this contention of petitioner was also overlooked by the Circuit Court of Appeals. As will appear from the brief in support of this petition, the decision of the Circuit Court of Appeals in the instant case is directly in conflict with the above principles.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 10178, Nat Rogan,

Collector of Internal Revenue, Appellant, vs. Catherine Nesa Conterno, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment herein of said Circuit Court be reversed by this court, with directions to affirm the judgment of the District Court, and for such further relief as to this court may seem proper.

Dated: April 7, 1943.

CATHERINE NESA CONTERNO,

HAROLD C. MORTON,
Counsel for Petitioner.

JOHN H. BLAKE,
Of Counsel.

I, Harold C. Morton, attorney for the petitioner, do hereby certify that the foregoing petition for a writ of certiorari is presented in good faith and not for delay.

HAROLD C. MORTON.